LAW OFFICES OF

MICHAEL S. SHIPLEY, LLC

CIVIL AND CRIMINAL TRIAL PRACTICE

204-A EAST KANSAS STREET
LIBERTY, MISSOURI 64068

MSHIPLEY@MSHIPLEYLLC.COM

(816) 781-0299
FAX (816) 781-4088

May 4, 2007

Beth Riggert, Communications Counsel
Supreme Court of Missouri
P.O. Box 150
Jefferson City, MO 65102

Dale Doerhoff, Chairman
Missouri Supreme Court Civil Rules Committee
231 Madison Street
Jefferson City, MO 65101

Re: Comments of the Clay County Bar Association Regarding:
Recommendations of the Joint Commission to Review Pro Se Litigation
Court Operating Rule 25
Proposed Revisions to Supreme Court Rule 4-1.2(c)
Proposed Revisions to Supreme Court Rule 55.03
Proposed Supreme Court Rule 88.09

Dear Judges of the Missouri Supreme Court and Chairman Doerhoff:

As president of the Clay County Bar Association, I have been asked to express our comments regarding the above matters. Since the Clay County Bar Association currently consists of over 300 members, many individual members doubtless disagree with at least some specific portions of the following. We nonetheless believe it represents a general consensus of our Association, and it was approved at a special meeting held on May 4, 2007.

Initially, we wish to express our appreciation for the incredible time and effort that the members of the Joint Commission to Review Pro Se Litigation, the Joint Pro Se Litigation Interim Feasibility Committee, the Joint Pro Se Implementation Commission, the Supreme Court Civil Rules Committee and the Supreme Court itself have expended on this project. We recognize that many individuals spent not only hours and days, but years, in this effort, and that the overwhelming majority of those individuals have been volunteers. We also acknowledge that it is all too easy for those who have not been involved in a process to simply criticize the efforts of those who have, and we therefore hope that the following comments will be considered in the constructive manner in which they are intended, and we have, to the extent we are able, attempted to suggest alternatives, rather than simply extend criticisms.

Court Operating Rule 25

Our understanding is that Court Operating Rule 25 was adopted to implement Pro Se Commission Recommendation 2, and motivated by a desire, on the part of the Implementation Commission, to assist clerk's office personnel by clarifying their responsibilities and duties. We wholeheartedly agree with subsections (c)(1, 2, 3, 9, 10 & 11), which generally address providing information about available services and resources, court procedures and required parent and / or child education courses and mediation. We believe those are traditional and appropriate functions of the clerk's office. We oppose sections (c)(4, 5 & 7) only because we oppose, for reasons set forth in detail below, the development and use of approved pleadings, forms and judgments in pro se family law cases. To the extent such forms are approved or mandated, clerk's office personnel should certainly be expected to provide information about the forms, without providing advice or recommendations as to any specific course of action, provide the forms and instructions themselves, and provide ADA mandated services for completion of those forms.

While we oppose subsections (c)(6 & 8) because they also contemplate the use of approved forms in family law cases, we also respectfully suggest that they be reconsidered even if the Court ultimately adopts approved forms. Recognizing that those provisions were intended to aid clerk's office personnel by clarifying and delineating their functions and obligations, we believe that those provisions cannot be effectively implemented in day-to-day operations, and that they will almost surely result in those personnel providing legal advice which they are not qualified to offer.

We fear that the hope that Rule 25 will provide a bright line standard for clerk's office personnel will prove illusory. Subsection (c)(6) provides that clerks and staff may "[a]nswer questions about completion of blanks on approved forms, without recommending specific content or phrasing for a pleading, specific types of claims or arguments to assert in pleadings, or recommend objections to pleadings." Lawyers and judges, given time for reflection and study, would not likely develop a consensus, in many instances, regarding whether specific answers included prohibited information or recommendations. Lay staff in a time sensitive spontaneous environment, responding to potentially emotional litigants, will almost surely come to differing conclusions and inconsistent results regarding what they should or should not say, with the result that they will frequently be giving legal advice, intentionally or not. To the extent that advice turns out to be inaccurate, a Pandora's Box of legal issues will arise regarding grounds for setting aside judgments, appeal rights, and potential "malpractice" or governmental liability claims by those whose rights have been prejudiced.

Although Joint Commission Recommendation 2 provides that a "curriculum and training program for court staff and advocates who interact with or assist pro se litigants should be developed," there are no provisions for such a program in Rule 25. We believe that such a program would certainly be a necessary component for implementation of Rule 25, but we do not think any economically feasible training program would be adequate.

By way of illustration, I recently received a call from a lady who had co-signed a lease with a boyfriend. The boyfriend shortly abandoned her to return to the arms of a former paramour, leaving her with the apartment. She attempted to file a small claims action to recoup half of the rent which the (now former) boyfriend was refusing to pay. Clerk's office staff would not allow her to file the petition, advising her that she could not sue for any portion of the rent because she did not own the real estate. I personally encountered a somewhat similar experience recently when attempting to file an application for trial de novo in an unlawful detainer case. Clerk's office personnel insisted that I file a notice of appeal to the Missouri Court of Appeals. Only after arguing with at least three different people in the office, with a combined seniority of well over 20 years, over a course of two days, was I able to get them to file my application for trial de novo.

These examples are not cited to criticize or embarrass anyone. They are referenced to illustrate that experienced employees failed to understand a fundamental aspect of their job- the clerk's responsibility is generally to file pleadings, leaving decisions regarding the appropriateness of the pleadings to Judges. We do not believe it is realistic to expect that training could effectively be implemented which would equip clerks office staff to answer the myriad of questions which would arise in completing pleadings, forms and judgments.

Initially, we suggest that the cost of such training would be prohibitive. Indeed, the Feasibility Committee noted that due to "tight budgets, high turnover, and management discretion, only a small portion of the court clerks actually attend" existing training. The issue of tight budgets is well illustrated in Clay County, where we switched to CaseNet about a year ago. As a result of backlogs created by that switch, the delay between the time a new case was filed and a summons was issued ran four to six weeks. After a year, the delay is still two to three weeks. We have been advised that this is because there is no money available to hire additional staff, or pay current staff overtime, to catch up. If we do not have the resources to allow clerks to issue timely summonses, we surely do not have the resources to train the clerks to train litigants to represent themselves in family law cases.

On a fundamental level- and this really expresses the crux of many of the objections expressed herein- we believe that divorce involves a variety of complicated legal issues which overlap with many other fields of law, and that it is not possible, in a matter of hours or days, to effectively teach clerk's office staff to assist pro se litigants. We acknowledge an expressed intent to provide assistance to pro se litigants "without providing legal advice," but believe it is inevitable that once clerks begin "answering questions about completion of blanks" they will in fact soon be giving legal advice.

Requiring clerks to provide assistance and offer classes on pro se representation cannot help but send the message that people can effectively handle their own divorces. We believe that is a false and dangerous message, which is not adequately tempered by an admonition at the beginning of the class that pro se representation involves substantial risks and responsibilities. Benjamin Franklin said that a lawyer who represents himself has a fool for a client, and a non-lawyer who represents himself is in an even more precarious position.

Proposed Supreme Court Rule 88.09

Many of the foregoing comments regarding Operating Rule 25 apply with equal force to proposed Supreme Court Rule 88.09. The adoption and promulgation of approved forms will reinforce the notion that pro se litigants can effectively handle their own cases. As just indicated, we strongly disagree with that notion, and do not believe the message is overcome by the proposed warnings. It is akin to telling an unqualified driver that we really do not think he should drive but, if he must, here are the keys.

On a related note, we do not believe it is realistic to develop a set of forms for a "one size fits all" divorce. While practicing domestic lawyers use forms in their practices, it is not feasible to prepare single documents which have all permutations in a check list fashion. Judge Nixon of the 16th Circuit has prepared on entire book just on judgments in domestic cases. Again, we believe that approving forms provides a false sense of security to the public that if they use these forms and get all the blanks filled in, they will have obtained a divorce, and resolved all attendant legal issues.

We are separately concerned about Rule 88.09's provision that the approved forms "shall be accepted by the courts of this state." In family law, perhaps more than any other area law, judges are vested with responsibilities to review and approve voluntary settlements, including determining whether property and pension divisions are fair and equitable, determining appropriate child support amounts, considering the best interests of the children in custody awards, etc. The Rule as written arguably prevents or limits a judge in the performance of his or her duty if a proposed judgment is presented on a form "approved by the Pro Se Commission."

In summary, we believe that domestic cases are such complicated and important legal matters that a party's interests can only be fully and effectively protected through representation by an attorney. Attempts to transfer that role to the court system, by adopting forms and providing training and assistance to pro se litigants, will provide a false sense of security to the litigants, put them at grave danger of receiving incomplete, inaccurate or simply bad legal advice, without any apparent means of recourse, and put substantial economic burdens on an already strained system. If resources are available to implement such a system, we suggest that they would be better used by investment into the legal aid system. Lawyers would then be able to assist clients with relatively simple cases, while having the knowledge to screen out cases requiring more extensive legal assistance due to complicating factors.

We are not unsympathetic to persons who are unable to afford a lawyer to obtain a divorce, but we are satisfied there is no legal right to a free lawyer in such cases. The public would doubtless soundly defeat any attempt to directly raise taxes to fund lawyers for people wanting divorces. The issue is therefore whether the court system should put itself in a situation of straining its already inadequate resources and modifying its traditional role in the legal system so that individuals may accomplish, without a lawyer, a task which, with only the most limited of exceptions, requires a lawyer. We suggest that it should not.

Proposed Changes to Rules 4-1.2(c) and 55.03

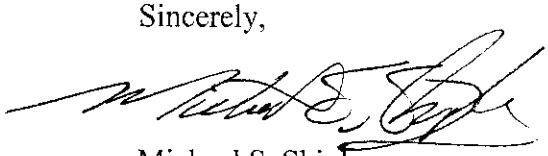
While at least some of our members doubt the wisdom of "unbundling," at least in a litigation context, from a potential liability standpoint, we generally agree that lawyers and clients should be able to negotiate the scope and extent of their relationship. We believe the proposed modifications to Rule 4-1.2(c), requiring a written notice and consent form, will reduce risks of misunderstanding between the lawyer and client, thus reducing the potential for liability.

We are concerned that Rule 55.03 may not adequately protect a client's interests in some situations. If, for example, a lawyer filed a written entry of appearance that would not include trial, the adverse side might refuse to settle pre-trial, or be much more aggressive in settlement negotiations, with the knowledge that the party with a limited representation attorney would be forced to either try the case pro se, or hire a new lawyer (likely resulting in substantial additional expense). Moreover, the client might not fully appreciate this risk at the outset of the representation. Accordingly, we would suggest that the withdrawal provisions of subsection (b) be reconciled with the requirement of Rule 4-1.16(b) that a lawyer may withdraw only if "withdrawal can be accomplished without material adverse effect on the interests of the client."

Conclusion

We conclude as we began- by thanking those who have donated so much time and effort to this endeavor. We also wish to thank each of you for giving us the opportunity to express our thoughts, and for taking the time to consider them. If you have any questions, or if you believe there is anything we can do to assist in this project, please feel free to contact us

Sincerely,



Michael S. Shipley
President, Clay County Bar Association

cc Vincent F. Igoe, Jr., Missouri Bar Board of Governors
James Boggs